STATE OF MICHIGAN
IN THE COURT OF APPEALS

ATLANTIC CASUALTY INSURANCE COMPANY, a Foreign corporation,

Plaintiff-Appellant,

v

GARY GUSTAFSON,

Defendant-Appellee,

and

ANDREW AHO,

Defendant.

MSC No: 154026
COA No: 325739
Lower Court No: 14-000055-CZ
(Ontonagon County)

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DEFENDANT-APPELLEE GARY GUSTAFSON'S ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL PURSUANT TO MCR 7.305(D)

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STATEMENT OF QUESTIONS INVOLVED

In this Contractor's insurance policy coverage dispute involving an injured homeowner and an exclusion for injury to Employees, Contractors, and Employees of Contractors, the following issues are presented:

I. WHETHER THE COURT OF APPEALS ERRED WHEN IT FOUND THE EXCLUSION ENTITLED "EXCLUSION OF INJURY TO EMPLOYEES, CONTRACTORS AND EMPLOYEES OF CONTRACTORS" DID NOT EXCLUDE COVERAGE FOR AN INJURY TO A HOMEOWNER?

Defendant-Appellee says:	"No"
Plaintiff-Appellant says:	"Yes"
The Court of Appeals says:	"No"

II. WHETHER THE COURT OF APPEALS ERRED WHEN IT FOUND THE EXCLUSION WAS SUBJECT TO MORE THAN ONE REASONABLE INTERPRETATION AND WAS THEREFORE AMBIGUOUS?

Defendant-Appellee says:	"No"
Plaintiff-Appellant says:	"Yes"
The Court of Appeals says:	"No"

STATEMENT OF FACTS

The facts of this case are not in dispute. Defendant-Appellee Gary Gustafson is a sole-proprietor doing business as Gustafson Excavating and Septic Systems (hereinafter "Gustafson") and was hired by Defendant Andrew Aho (hereinafter "Homeowner") to perform landscaping and drainage work around a pond located on the Homeowner's property. Plaintiff-Appellant Atlantic Casualty Insurance Company (hereinafter "Atlantic Casualty") provided Commercial General Liability insurance coverage for Gustafson's business. That policy of insurance is the subject of this appellate action.

The Homeowner was watching while Gustafson's employee was clearing brush along the Homeowner's pond with a brushhog (a motorized machine with circulating blades used to cut brush and other woody fiber). A piece of debris flew from the brushhog and struck the Homeowner in the eye, causing an injury. The injury was immediately reported to Gustafson's insurance agent, who assured Gustafson that the matter was covered by the Atlantic Casualty policy of insurance.

Upon review by Atlantic Casualty, they agreed the policy granted coverage for this type of loss, but claimed an Exclusion for "Injury to Employees, Contractors, and Employees of Contractors" applied for an injured Homeowner and denied coverage to Gustafson.

The Homeowner filed a personal injury lawsuit against Gustafson in Ontonagon County Circuit Court (case number 2013-000021-CZ). Gustafson tendered the defense to Atlantic Casualty. Atlantic Casualty brought this separate, related action (case number 2014-000055-CZ) seeking a declaratory judgment as to whether the subject

policy provides indemnity and/or a duty to defend Gustafson against the Homeowner's claim. The Ontonagon County Circuit Court granted Atlantic Casualty's motion for summary disposition finding the exclusion in the subject policy of insurance for Employees, Contractors, and Employees of Contractors applies to an injured Homeowner and thus Atlantic Casualty does not have a duty to indemnify or defend Gustafson in the underlying action.

The court of appeals reversed the circuit court and found that a homeowner was not the type of individual envisioned in the exclusion and furthermore found that the exclusion was subject to more than one reasonable interpretation and was therefore ambiguous. (Exhibit 1). This finding was consistent with the decision of the Connecticut Superior Court [*Turano v. Pellaton*, 2014 Conn. Super. LEXIS 146; 2014 WL 660513 (2014); Exhibit 2] and the decision of the United Stated Seventh Circuit Court of Appeals [*Atlantic Casualty Insurance Company v. Paszko Masonry, Inc.*, 718 F.3d 721 (2013); Exhibit 3], which both interpreted the same exact insurance exclusion in other policies of insurance issued by Plaintiff-Appellant.

FAILURE TO SHOW ADEQUATE GROUNDS FOR THE SUPREME COURT TO HEAR THE ARGUMENT

The Michigan Court Rules require the following specific grounds for an Application to the Supreme Court:

> **(B) Grounds.** The application must show that
>
> (1) the issue involves a substantial question about the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves a legal principle of major significance to the state's jurisprudence;
>
> (4) in an appeal before a decision of the Court of Appeals,
>
> > (a) delay in final adjudication is likely to cause substantial harm, or
> >
> > (b) the appeal if from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid;
>
> (5) in an appeal of a decision of the Court of Appeals,
>
> > (a) the decision is clearly erroneous and will cause material injustice, or
> >
> > (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or
>
> (6) in an appeal from the attorney Discipline Board, the decision is clearly erroneous and will cause material injustice.
>
> MCR 7.305(B).

Plaintiff-Appellant merely recites a statement of the facts and then makes the following statement regarding the Court of Appeals decision: "Atlantic Casualty disagrees with this logic and conclusion which is contrary to the plain meaning of the

exclusion and the applicable principles of contract interpretation in Michigan and seeks leave to appeal from the Court of Appeals decision." (Plaintiff-Appellant's Application for Leave to Appeal, p. 5).

Plaintiff-Appellant has failed to show or analyze in any substantive fashion a legitimate basis for the Supreme Court to hear this case, in accordance with the court rules.

The Court of Appeals held that the facts of this case, including the wording of the insurance exclusion, did not exclude the homeowner from coverage under the insurance contract and further that the exclusion was ambiguous as to who was excluded, since there is more than one reasonable interpretation of the exclusion.

It appears Plaintiff-Appellant is claiming the Court of Appeals' decision is "clearly erroneous," as that term is used in the grounds for appeal in MCR 7.305(B)(5)(a). A finding is clearly erroneous if there is no evidentiary support for it or this Court is left with a definite and firm conviction that a mistake has been made. *Chelsea Inv. Group LLV v City of Chelsea*, 288 Mich App 239, 251; 791 NW2d 781 (2010) [citing *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007)].

In our case, the Court of Appeals held the insurance exclusion was not meant to exclude the homeowner from coverage and the Court of Appeals further held the exclusion was subject to more than one reasonable interpretation, making it ambiguous. Such a finding by the Court of Appeals has evidentiary support in the wording of the insurance exclusion itself and in accordance with Michigan case law. The Court of Appeals finding is not clearly erroneous. Accordingly, Plaintiff-Appellant's Application for Leave to Appeal should be denied.

LEGAL ARGUMENT

A) THE SUBJECT POLICY EXCLUSION IS INHERENTLY AMBIGUOUS BECAUSE IT CANNOT STAND ON ITS OWN AND REQUIRES INTERPRETATION TO AVOID ABSURD RESULTS

The Court of Appeals held that because of Plaintiff's admission that the term "property owner" needed to be interpreted to avoid absurd results, Plaintiff admitted the exclusion to be ambiguous. (Exhibit 1, pgs.4-5).

The insurance exclusion at issue, entitled: "Exclusion of Injury to Employees, Contractors and Employees of Contractors," included a definition of contractor as follows:

> As used in this endorsement, "**contractor**" shall include but is not limited to **any independent contractor or subcontractor of any insured, any general contractor, any developer, any property owner**, any independent contractor or subcontractor of any general contractor, any independent contractor or subcontractor of any general developer, any independent contractor or subcontractor of any property owner **and any and all persons providing services or materials of any kind for these persons or entities mentioned herein**. (Emphasis added).

At first blush, the exclusion appears to include as contractors every property owner of any kind, which would in effect exclude most everyone from coverage, since we all own property of some kind (whether real property or personal property). Plaintiff admitted in the trial court that such an interpretation would be absurd and Plaintiff urged the trial court to interpret the exclusion to mean the homeowner, but not to mean every property owner of any kind. The Court of Appeals held there is a more reasonable

interpretation as follows:

> "[w]e believe that the better interpretation of 'any property owner,' given that it is included in a list that otherwise only includes those that have a commercial interest (or their employees), is that it does not include those without a commercial interest in the project, namely, in this case, the residential homeowner. Or, as Judge Posner ultimately reasoned in Paszko, when faced with two plausible interpretations, we must select the one that favors the insured and, therefore, the interpretation that excludes a residential homeowner from the definition of 'contractor' 'thus rules the case.'"
>
> Court of Appeals Opinion dated May 26, 2016, Docket No. 325739, page 7 (citing *Atlantic Casualty Insurance Company v. Paszko Masonry, Inc.*, *supra* at 725).

The Court of Appeals further held that the need for an interpretation in itself shows an ambiguity exists. (Exhibit 1, pgs. 4-5).

B) THE COURT OF APPEALS DECISION IS SUPPORTED BY DECISIONS IN OTHER JURISDICTIONS

Connecticut Case law. The Superior Court of Connecticut heard a case that involved a policy of commercial general liability insurance issued by the very same Atlantic Casualty Insurance Company and containing the exact same exclusion for "Employees, Contractors and Employees of Contractors." *Turano v. Pellaton*, 2014 Conn. Super. LEXIS 146; 2014 WL 660513 (2014) [Exhibit 2].

The Connecticut court held that a homeowner was not included in the exclusion for Injury to Employees, Contractors and Employees of Contractors, despite the definition of contractor including "property owners."

Plaintiff-Appellant argues that the Connecticut court relied on the wording of the heading for the exclusion in deciding that case, which technique Plaintiff-Appellant states is contrary to the law in Michigan. However, Plaintiff-Appellant does not provide any support for this suggestion. To the contrary, in Michigan every word, clause and phrase of the insurance contract must be construed in harmony, to avoid rendering any part of the contract surplusage or nugatory. *Royal Property Gp, LLC v Prime Ins Syn*, 267 Mich App 708; 706 NW2d 426 (2005). The heading is a part of the contract; the same as every other word, clause, or phrase; and should be used in interpreting the exclusion.

United States Seventh Circuit Court of Appeals. The United States Court of Appeals for the Seventh Circuit heard a case that involved a policy of commercial general liability insurance issued by the very same Atlantic Casualty Insurance Company (Plaintiff-Appellant) and containing the exact same exclusion for "Employees, Contractors and Employees of Contractors." *Atlantic Casualty Insurance Company v. Paszko Masonry, Inc.*, 718 F.3d 721 (2013). [Exhibit 3].

The court was very critical of what they described as a poorly drafted exclusion. The court held that the exclusion does not render coverage illusory, but it is ambiguous, since alternative interpretations of the Contractor Exclusion are plausible. The exclusion could be interpreted broadly as Atlantic Casualty suggests, or it could be interpreted more narrowly. The court held that ambiguities must be resolved against the insurer, and a narrow interpretation of the Contractor Exclusion must be employed. *Id*. at 725.

C) THE COURT OF APPEALS EMPLOYED PROPER LEGAL ANALYSIS

The Court of Appeals used the relevant and proper standard of review, which was summarized by the Supreme Court in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 664 NW2d 776 (2003) as follows:

> The proper interpretation of a contract is a question of law, which this Court reviews de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). The same standard applies to the question of whether an ambiguity exists in an insurance contract. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). Accordingly, we examine the language in the contract, giving it its ordinary and plain meaning if such would be apparent to a reader of the instrument.
>
> Court of Appeals Opinion dated May 26, 2016, Docket No. 325739, page 2 (citing *Wilkie v Auto-Owners Ins Co*, *supra* at 47).

The Court of Appeals interpreted the insurance exclusion according to its ordinary and plain meaning, as would be apparent to a reader of the instrument and the Court of Appeals held that the homeowner was not included as a contractor under the exclusion.

The Court of Appeals further held that the exclusion was subject to more than one reasonable interpretation of who was included as a property owner under the contractor exclusion, thus making the exclusion ambiguous.

CONCLUSION

The Court of Appeals held that Atlantic Casualty's Contractor Exclusion did not exclude coverage to a homeowner and the exclusion was subject to more than one reasonable interpretation, thus making the exclusion ambiguous. This was supported by the following:

a) the wording employed in the exclusion

b) the facts of this particular case

c) the analysis of the Connecticut Superior Court

d) the analysis of the U.S. Seventh Circuit Court of Appeals, and

e) Michigan case law concerning insurance contract interpretation.

The Court of Appeals employed the proper standard of review in interpreting the insurance exclusion and finding the exclusion as being ambiguous and not including the homeowner. Accordingly, the Court of Appeals properly reversed and remanded this case with an order for the trial court to enter summary disposition in favor of Defendant-Appellee.

Plaintiff-Appellant has failed to show the basis for the Supreme Court to hear this case, pursuant to MCR 7.305(B).

RELIEF REQUESTED

Defendant-Appellee Gustafson respectfully requests this court deny Plaintiff-Appellant Atlantic Casualty Insurance Company's Application for Leave to Appeal.

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